APPENDIX

*A-779-59

Opinion of the Appellate Division

HOUSING AUTHORITY OF THE CITY OF TRENTON, *Plaintiff-Respondent,*

vs.

MAURICE A. FINKLE, et als., *Defendants-Appellants.*

Argued March 22, 1960—Decided July 5, 1960

Before Judges Price, Gaulkin and Foley.

MR. JOHN A. HARTPENCE argued the cause for the defendant-appellants.

MR. ARTHUR S. KELSEY argued the cause for the plaintiff-respondent (MESSRS. MARK D. KAPLAN and JULES J. KELSEY, attorneys).

The opinion of the court was delivered by GAULKIN, J. A. D.

This is a condemnation case. The condemnation commissioners awarded to the defendant property owners $12,800 for 616 Perry Street and $30,300 for 618, or a total of $43,100. Plaintiff appealed from these awards, and the defendants cross-appealed. The appeals were consolidated for trial and the parties agreed that the jury bring in a single verdict for both parcels. The verdict was $26,000, and the defendants appeal.

The first contention is that the trial court erred in refusing to grant defendants' motion to set aside the verdict of the jury and grant a new trial on the ground that the verdict was against the weight of the evidence.

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The Authority's only witness was a Mr. Bradley. He placed a value of $22,400 on the two parcels, and said he

based that opinion upon the prices paid in what he considered to be comparable sales, and upon the estimated net income that could be derived from the property. He said ". . . on the rentals now being paid and being paid over a period of years for this type of property in that block, an investor-purchaser should be able to derive a net return of between 8 and 9% after paying all operating costs . . ." or ". . . something around $2,000, $2,200." He figured 616 alone worth $7,000 and 618 alone $11,650, or a total of $18,650 but as a unit he was of the opinion the total market value would be approximately 20% greater, or $22,400. However, Bradley was not asked and did not testify how much he estimated the rental value to be, nor did he state the total amount of the ". . . taxes, insurance, water rent, maintenance, management charges, . . ." which would have to be deducted from the rental income to leave a net of "$2,000, $2200."

The premises were, in fact, not rented, because the defendants operated a store which occupied all of the ground floor of both buildings, an archway having been cut through the intervening walls. 616 was frame, 618 brick. Defendants admitted that the upper floors of 616 had been untenanted since May 1958. The upper floors of 618 were occupied for dwelling purposes by the defendants, or some of them.

The defendants produced two real estate experts, Mr. McCarthy and Mr. Bachman. Mr. McCarthy testified that the upper floors of 616 ". . . could not be lived into [sic] under the present conditions"; the store ". . . would bring probably $175 a month, the joint stores"; the upper floors of 618, $225 per month. This made a gross rental of $400 per month or $4800 per year, which he estimated would yield a net income of approximately $3,400 a year. In effect, therefore, he estimated the costs to be deducted from the $4,800 gross rental per year would total $1,400 per year. McCarthy placed a value of $68,578 upon the com-

bined properties, and when asked on cross examination whether he had stated on direct that ". . . in its present condition and for that sum of money . . .' a purchaser would be willing to buy when the return was only 5%, he answered "I said 5 or 6% return." He admitted that ordinarily an investor in real estate expects "anywheres from 8 to 12%."

Mr. Bachman agreed that the upper floors of 616 were not tenantable, but in nearly all other important respects he disagreed with Mr. McCarthy. He testified that the rental value of the upper floors of 618 was $150 per month, while that of the store was $5,200 per year or about $440 per month. He agreed that "[r]eal estate investments usually have to produce 9 or 10 [per cent] to be attractive." He testified that in his opinion the value of the property was $55,200, and that this ". . . should return about a 9 point return . . . I believe the net income would be around $5100." Since his estimate of the gross annual rental totaled $7,000 per annum, his cost estimate was necessarily $1,900 to produce a net income of $5,100.

The jury, therefore, had the right to accept the following annual figures, since they were presented by defendants own experts:

Store rental at $175 per month (McCarthy)	$2,100.00
618 upstairs rental at $150 per month (Bachman)	1,800.00
616 upstairs (McCarthy and Bachman)	0.00
Total Annual Rental	$3,900.00

If there be deducted from this gross annual rental Mr. Bachman's estimated $1,900 as the annual cost of operation, the net income would be $2,000 per annum. If there be used Mr. McCarthy's figure of $1,400, the net would be $2,500 per annum. Either capitalized at the 9 to 10% yield

agreed upon by Mr. Bachman as fair, justified the $26,000 verdict on an income basis. In any event, either net income figure is not so far from Mr. Bradley's estimate of $2000 to $2,200 as would justify us in holding that the trial court erred in refusing to set aside the verdict.

Defendants contend also that the verdict is against the weight of the evidence because the sales used by Mr. Bradley were not truly comparable, whereas those used by Mr. Bachman were, and, therefore, the jury should have accepted Mr. Bachman's testimony and rejected Mr. Bradley's. However, once admitted, it was for the jury to determine which testimony it would accept. We perceive no error in the trial court's admission of the testimony, and it is settled beyond extended discussion that we may not upset the verdict of the jury merely because we would have decided otherwise had we been the triers of fact.

We have examined the other arguments of defendants relating to the weight of the evidence, and find no error in the trial court's denial of a new trial on that ground.

Defendants contend that the trial court committed prejudicial error in refusing to permit their witnesses McCarthy and Di Nola ". . . to testify separately with regard to building value and land value especially in view of having permitted like testimony from plaintiff's only witness."

In support of this contention defendants say first that plaintiff's witness Bradley valued the buildings and the land separately and therefore McCarthy should have been permitted to do the same. However, as we read Bradley's testimony, he did not value the land and the buildings separately.

Defendants now say they wanted McCarthy to give his separate valuation of the land and the building "to show the bases upon which he reached that opinion" that the properties were worth $68,578. However, defendants did not advance this ground for the admission of the testimony

to the court below and never made it clear to the court below, by offer of proof or otherwise, that they sought to prove by Mr. McCarthy anything other than reproduction cost less depreciation. For example, when the trial court asked, as it did several times, for an offer of proof, the reply was:

"Mr. Hartpence: The purpose in calling him is that he has examined the buildings and he has formed a conclusion as to the value of the buildings as of the time of the taking, and that is what we have a right to show, surely, in contradiction or in whatever it may result in to the testimony that is already in as to what the realtor has the value of these buildings in reaching his conclusion.

The Court: Well, now you say value of the buildings. I am asking you, replacement cost or what?

Mr. Hartpence: Well, I will have to leave it to Mr. McCarthy and Mr. Di Nola to show what their theory of it is. My object is to show what their judgment or opinion is as to the value of those buildings as they stood. Now, how they will reach their conclusion, I will have to leave it to them to work out their theory."

After considerable discussion, counsel continued:

"Mr. Hartpence: I don't offer him as a realtor expert at all. He is not being brought in as a realtor at all. He is brought in as a man who is a builder, a constructor of buildings, who knows what it costs to build a building, and he knows what a building is worth that has been used for years and just what the value of that building is as it stands there.

Now, how he reaches his conclusion may be a different matter. I will have to leave that to the expert; but surely in view of the fact that Mr. Bradley, the one witness for the Housing Authority, has based his value

of these properties upon the value of the building on each tract, I have a right to show that he is entirely erroneous in his concept of the value and he is not even a builder or a construction engineer. He is a realtor."

After many more pages of colloquy, the court adjourned for the day. The following morning the court said:

"The Court: Now, gentlemen, we had considerable discussion yesterday, and I think the subject has been pretty well covered and I still don't know the purpose of the last witness . . ."

Counsel then said that defendants' purpose was to prove reproduction cost less depreciation and obsolescence. The court thereupon ruled that because of the age of the buildings, and their nature, condition and use, he would not permit such testimony.

Defendants contend that this also was error, arguing that the property in question was "unique in the entire area," and under such circumstances testimony of reproduction cost less depreciation should have been received. They do not cite *State* v. *Burnett*, 24 N.J. 280 (1957) in their brief, but since they did mention the case below, and since it is the strongest authority for defendants' position, we shall assume that defendants rely on it and the authorities therein cited. Suffice it to say that the *Burnett* case did not lay down an absolute rule but still left it to the sound discretion of the trial court whether to receive such evidence. In the case at bar we can not say that the court "abused" that discretion. To begin with, no owner or buyer would reconstruct these buildings—even the Finkles themselves. The buildings here had not (as in *Burnett* and in *Bartindale* v. *Aetna Ins. Co.*, 7 N. J. Misc. 399 (Sup. Ct. 1929); same case after retrial, 9 N.J. Misc. 535 (Sup. Ct. 1931) been designed by an owner who wanted them that way and would rebuild them. Here the buildings were not originally designed for the commercial purposes to which they had been adapted,

and if they were destroyed it is inconceivable that they would be rebuilt as they are now. In addition, the buildings are old, obsolete, and 616, at least, is in great disrepair. We are not convinced that these buildings were so unusual as to make it necessary to permit evidence of reproduction cost less depreciation.

Furthermore, when Mr. McCarthy did ultimately testify as a real estate expert, he stated that he arrived at his figure of $68,578 on the basis of "the cost of the building less depreciation" plus land value.

In short we find no prejudicial error in the exclusion of the evidence.

Defendants challenge also the trial court's rulings on other offers of proof, namely (a) excluding testimony by defendants' witness, Mr. Bachman, respecting certain "comparable" properties (b) refusing to permit Maurice A. Finkle to testify as to the amounts spent for maintenance (c) refusing to permit Maurice A. Finkle to testify whether or not agreement had been reached with plaintiff regarding compensation, and (d) refusing to allow one of the owners to testify as to the cost of moving.

The properties which the trial court refused to accept as "comparable" were from 8 blocks to a mile away from the premises in question. Defendants have not demonstrated to us that any of the rulings above listed was prejudicial error.

The defendants also urge as plain error the court's charge to the jury as to the use they were entitled to make of their own view of the premises. We perceive no "plain error" in this charge.

Finally, defendants argue that the court erred "[i]n limiting the finding of the award by the jury to the price as between a willing buyer and a willing seller as of September 29, 1958," and ". . . in ruling September 29, 1958, as the effective date for the fixing of value of the subject properties, in refusing to charge defendants' request No. 2, and in

excluding evidence tending to show the damaging effect of delay."

September 29, 1958 was the date of the filing of the complaint for condemnation. R. S. 20:1-9 provides for the "... assessment of the amount to be paid ... for the land or other property and damages as aforesaid, as of the date of the commencement of the action ...," and generally "the proper measure of compensation is ... said to be the fair market value at the time of the institution of ... condemnation proceedings." *State* v. *Jones*, 27 N.J. 257 (1958); *Wilson* v. *City of Long Branch*, 27 N. J. 360, 373-375 (1958); *N. J. Highway Authority* v. *Wood*, 39 N. J. Super. 575 (App. Div. 1956); *Danforth* v. *United States*, 308 U. S. 271, 285, 60 S. Ct. 231, 236, 84 L. ed. 240, 246 (1939). There is nothing in the testimony in this case that warrants the application of a different rule, nor that would justify charging defendants' request No. 2 or the admission of what defendants call "evidence tending to show the damaging effect of delay."

The judgment is affirmed. No costs.

MANDATE ON AFFIRMANCE

(Filed 7/5/60)

This cause having been duly argued before this Court by John A. Hartpence, counsel for the appellants and Arthur S. Kelsey, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division, to be there proceeded

with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 5th day of July, 1960.

I. Grant Scott /s/
I. GRANT SCOTT
Clerk of the Superior Court

Notice of Petition for Certification

(Filed 7/25/60)

L-11501-58:
L-11507-58:
L-11806-58:
L-11807-58:

To: MARK D. KAPLAN, ESQ.,
JULES J. KELSEY, ESQ.,
Attorneys for Plaintiff-Respondent,
28 West State Street,
Trenton, New Jersey.

TAKE NOTICE that the defendant-appellants, MAURICE A. FINKLE, et als., will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of the Appellate Division entered in favor of the plaintiff-respondent in this action on July 5, 1960.

Dated: July 25, 1960.

John A. Hartpence /s/
JOHN A. HARTPENCE
Attorney for Defendants-
Appellants.

I hereby certify that the foregoing is a true copy of the original on file in my office.

I. GRANT SCOTT
Clerk.

Judgment of
Supreme Court of New Jersey

HOUSING AUTHORITY OF THE CITY OF TRENTON, *Plaintiff-Respondent,*

vs.

MAURICE A. FINKEL, et al., *Defendants-Petitioners.*

On Petition for Certification. Order Denying Petition. To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the third day of October, 1960.

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court
A true copy
JOHN H. GILDEA
Clerk

Filed Oct. 3, 1960
John H. Gildea, Clerk

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1960

MAURICE A. FINKLE, etc., et al., *Petitioners,*

vs.

HOUSING AUTHORITY OF THE CITY OF TRENTON, et al.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28, 1961.
Dated this 30th day of December, 1960.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States.